The Birth of Professional Ethos: Some Comparisons Among Medicine, Law and Intelligence Communities

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Introduction

Doctors in antiquity used leeches, herbs and shamanistic rituals to try to help their patients heal from the wounds and illnesses of life. Yet even in this long pre-scientific period, some felt a need to develop an ethos and codes of ethics specific to their craft.

One goal was prestige, a social good of intangible but real value (especially when practitioners are ridiculed by many, common when medicine was young). Close behind was another goal, a privileged and eventually exclusive right to practice their craft commercially. As science and technology advanced, a third goal emerged. This was continuing professional education to meet a growing need for both technical competence and some systematic way to evaluate novel dilemmas that emerged as medicine became truly effective. The best examples of those dilemmas come from "test-tube babies," but there are many other dilemmas like end of life issues when machines can sustain a brain-dead body, or access to intrinsically scarce resources like transplantable organs.

The concept of a professional medical ethos was built upon more general ethics of the Greeks (and independently within the Chinese and Indian civilizations at least). Its earliest generally recognized form was the oath of Hippocrates. [1] This served to identify special responsibilities to be assumed by those who would call themselves 'professionals' of the healing arts. Sometimes rights were included, but the responsibilities were primary to Hippocrates, like his famous injunction to first, "do no harm." In addition to that he urged doctors to take care of mentors who trained them and to not dishonor the emerging profession by sexual acts with patients or their families, or by inducing abortion.

Medicine had a very mixed reputation in its early years when incompetence and quackery were at least as common as actual skill in a pre-scientific and unregulated era. Attorneys of antiquity were also loved by some and loathed by others. "The first thing we do, let's kill all the lawyers" is one of Shakespeare's most quoted lines for a reason. Rulers tend to like the attorneys they employ to administer their empire (unless they impede the sovereign). But little people with few resources tend to take a different view on the ethics of attorneys, who are commonly employed by those with the most money. The prime paradox here is that without restraints of law little people are often crushed by the powerful.

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[1] A classical version of the Hippocratic Oath can be found in translation of the Greek by Ludwig Edelstein, Baltimore: Johns Hopkins Press, 1943. A modern version of the Oath was written in 1964 by Louis Lasagna, Dean of the School of Medicine at Tufts University. Both texts can be found at: http://www.medterms.com/script/main/art.asp?articlekey=20909

Ethics in its purest form strives to mediate between the potential to help and the potential to harm that comes with any power, medical, legal, military or that acquired by intelligence professionals. A key conundrum is that powerful professions tend to attract people who crave power, and some are prone to abuse that. And even "good" people can change, as Lord Acton noted when he said that "power tends to corrupt and absolute power corrupts absolutely." This problem is particularly pernicious with secret power where checks and balances are mostly absent. Secret power is the main domain of spies. Powerful professions are also often quite lucrative, relative to farming or digging ditches anyway, so money motives often corrupt higher ideals.

The Bible provides caustic commentary on the ethics of the scribes and Pharisees who ruled in ancient times or who at least wrote down the rules. They knew the letter of laws, but whether they understood spirit of law or had a sense of universal ethics higher than pleasing their employers was questionable. The writers of the Bible had a cynical view of scribes and Pharisees, as do underdogs everywhere. As human beings we are all vulnerable to the temptations of power. So the quintessential goal of ethics education is to encourage us to take high roads even when we do not "have to."

Primitive bureaucracies emerged that added their own layer of dubious motives to systems designed in theory to benefit whole kingdoms or empires. Bureaucracies protect their own interests first, like most people. Careerism and other economic factors always contaminate the ideal goals of allegedly "pure ethos." The power of bureaucracies to undermine good intentions of decent people is legendary, but also a complex topic we can barely touch on here.

Spies have been with us for at least as long as healers and legal wordsmiths. Sun Tzu wrote a chapter on their proper employment in the incomparable "Art of War" about 4 centuries before the birth of Jesus, and Thucydides the Greek wrote about them in "The Peloponnesian War" during the same century. [2] But despite being characterized as the world's "second oldest profession," development of a professional ethos for spies is a much more recent phenomenon of the third millennium of the common era. It will also be much more difficult to develop.

Not that ethics for spies don't have roots. Ever an adjunct to military enterprise, intelligence professionals have often been guided by the ethical thoughts of warriors. In fact, many spies were warriors before graduating to the dark side, and one should never forget that official intelligence is generally an instrument of war. [3] There have been

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[2] Tzu, Sun. The Art of War, as translated by Thomas Cleary, NY: Random House, 1988. Thucydides. The History of the Peloponnesian War, edited in translation by Sir R. W. Livingstone. London: Oxford University Press [1943] (1972 printing).

[3] "Competitive" or business intelligence with its "SCIP" code of ethics is a notable exception. Adopted by a Society for Competitive Intelligence Professionals formed in 1986, it is simple, focusing on loyalty to the commercial client and obeying "law" and "company policies."

rudimentary, informal conduct codes in many official intelligence agencies for a very long time, the most common of which was, and remains, "Don't get caught."

Other than the SCIP code, development of a genuine, codified ethic for spies (e.g. written down and taught in intelligence colleges) is definitely a phenomenon of the third millennium CE. Several writers in an edited work on "Intelligence Ethics" remarked in 2007 about what a new concept ethics for spies is. [4] Many never had any formal training in ethics when they studied their trade in government schools, and some still think this is the dumbest idea ever. What passes for ethics training today in most American schools of intelligence is simple 'do not steal from the company, hire your relatives or lie to your bosses' codes. That's morality for morons and bureaucrats. So we press on for the same reason diplomats eventually created the Geneva Conventions and Congress the American Laws of War. Without some restraint, we all become barbarians. And a land of barbarians is a lousy land to live in.

While "spy" laws exist, law is not ethics, and development of a genuine ethos for spies with actual codes of ethics has been much slower than among the uniformed officer corps partly because of the intrinsic secrecy that distinguishes their craft, and partly due to the obvious fact that breaking the laws of other people is such a central aspect of the intelligence business. The House Intelligence Committee study of 1996 (IC21) claims that at least 100,000 felonies per year are committed in the name of official intelligence for national security by U.S. agencies alone.[5] And who counts which laws the Chinese break, or the many mukhabarat? Many of those who have written on this esoteric subject comment on the difficulty of framing an ethic for workers within organizations that break laws for a living and which are so different from ordinary institutions in other ways. Yet special laws for spies exist today. Why not codes of ethics also?

The recent uproar about renditions, official torture, warrentless surveillance of citizens brought up on respect for a Constitution with a Bill of Rights, and antecedent failures of intelligence that led to various disasters have generated a bureaucratic moment

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[4] Andregg, Michael. Intelligence Ethics: The definitive work of 2007*, St. Paul, MN: Ground Zero, 2007, with 14 essays by professionals from 6 countries. And see Goldman, Jan. Ethics of Spying, Lanham, MD: Scarecrow Press, 2006, 2nd ed. 2009, with an appendix of US agency codes.

[5] The following quote from this IC21 study can be found at the government secrecy website of the Federation of American Scientists at http://www.fas.org/blog/secrecy/2007/10/08 .

"The CS [clandestine service] is the only part of the IC [intelligence community], indeed of the government, where hundreds of employees on a daily basis are directed to break extremely serious laws in countries around the world in the face of frequently sophisticated efforts by foreign governments to catch them," according to a 1996 House Intelligence Committee staff report called IC21 (chapter 9, at page 205). Later, "A safe estimate is that several hundred times every day (easily 100,000 times a year) DO [Directorate of Operations, now called the NCS] officers engage in highly illegal activities (according to foreign law) that not only risk political embarrassment to the US but also endanger the freedom if not lives of the participating foreign nationals and, more than occasionally, of the clandestine officer himself."

among American intelligence agencies and professionals to consider ethics more deeply. That time will pass, so it is precious and should be used wisely. Anyone can be a thief, a thug or a torturer – intelligence professionals strive to rise above that status. One result was the first meeting of a new "International Intelligence Ethics Association" in January, 2006. The fifth IIEA conference was in March, 2011, but whether it is making real progress remains to be seen. Progress is difficult because talking "ethics" is much easier than living a virtuous life in amoral, and sometimes bluntly immoral bureaucracies.

This paper will review in a bit more detail the evolution of professional ethics in medicine and law as they interacted to create the current system. Comparisons will be made to similarities with and differences from, the special needs and conundrums faced by those who call themselves intelligence professionals.

Some Common Themes and Differences

Medicine is a healing art; war a killing one. Yet each has professional ethos built on common foundations, one of which is protecting the community from life-threatening problems. Law is an ordering system; spies break laws like twigs beneath their feet. Yet each feels that they are moral human beings with consciences and have reasons for their decisions when faced with moral challenges. All power may heal or harm; it is in the wisdom by which it is employed, or lack thereof, that makes the difference.

One of the common themes among these disparate professions is a commitment to some social good beyond the individuals involved. [6] Another is a life-long commitment to personal professional development. A third is to their profession. And a fourth is commitment to "the truth" in some circumstances, although the circumstances where truth should be told vary quite widely among these groups. Finally, every one of these professions has a mortal enemy which is best described by the Greek word "hubris" (or excessive pride) that corrodes both moral sensibility and professional competence.

All of these professions are being transformed by technology which is applying stress to ethical systems everywhere whether codified or not. Advances in medical technology present new conundrums almost daily as things undreamed of by the ancients become possible. Attorneys and lawmakers always want to have their say, so laws proliferate like kudzu. [7] America has over 1 million laws today, for example, which everyone is supposed to know. Even police-states ponder what to do when technology enables everyone to know everything about anyone. Computers and tiny video cameras

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[6] Doctors, soldiers and spies, at least, are supposed to risk their own lives to do their professional duty dealing with plague, disaster or military dangers to the state. And more than one attorney has been killed by a client they were truly trying to help.

[7] Kudzu is a woody plant known for explosive growth and takeover of ecosystems. Later we will discuss what happened when attorneys got involved in regulating medicine, a process that blew back on them with some very elaborate Codes of Professional Conduct for attorneys.

seemed like magic tools to some police-state enthusiasts, until they remembered how important secrets are to the maintenance of some forms of rule. [8]

Differences among these groups are at least as revealing as commonalities. One of the most important is who one's "client" is. In medicine, the primary focus of doctors ***should*** be the welfare of their patients rather than of commercial entities or governments they interact with. Far different for warriors and spies who are usually quite committed to a particular government or commanding leader. Governments are often the client of attorneys as well, or at least are their employers, but by no means always. So sometimes lawyers are disposed to support the government view, sometimes the opposite. But in all cases attorneys are considered "officers of the court" and are supposed to never actually break the law or dishonor their profession.

One definition of the "intelligence professional" is that he or she is regularly paid by a government. But for others, their client is an ideal, like "national security" or the "Constitution" or "freedom" or other icons of loyalty. Those who work for money may be employed by any number of governments or other entities, so whom they are working for today is an open question, which those who double or "turn" agents are intimately aware of. Those who work for ideals can also change their minds, so there are no guarantees in this domain.

Truth Telling and Confidentiality

The relationship of each of these professions to "truth" is peculiar. In theory medicine is always dedicated to truth within the profession, and generally to patients, but there were deep debates during the development of medical ethics about when telling unvarnished "truth" to patients might be unwise. The concern was whether to tell very sick patients that death was inevitable or imminent. One of the paradoxes of their trade is that no matter how skilled the doctors, patients always die in the end, so whether to say that out loud is a real issue. In theory, military officers are always bound to tell the truth to their superiors, and expect trust from those they lead, yet in practice what comes down the chain of command is sometimes baloney to use a mild term. Everyone is also supposed to keep national security secrets from people outside the unit, for which operational security is an icon second to none (for the obvious reason that surprise helps military operations, while its converse can lead to death). So lying to the outside world is sometimes absolutely expected, and rigorously enforced.

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[8] Peruvian President Alberto Fujimori and his head of secret police, Vladimiro Montesinos, learned this the hard way. Montesinos was videotaped bribing a congressman in Lima on behalf of his President. When it aired on national TV on September 14, 2000, scandal erupted and both of them were indicted. Fujimori fled to Japan and Montesinos to Venezuela where he was arrested and extradited to Peru for trial. Fujimori was sentenced to 6 years in prison in December, 2007 and faces many more trials on serious charges. Rule by secret police can run into serious trouble when the secrets are exposed.

This dichotomy of telling truth to some while lying to others is most pronounced among spies, who are obviously not telling truth to their target country, but in theory are supposed to reveal only truth to their secret employers. In fact, prospective spies are generally required to hide nothing from their employers no matter how private, as anyone who has endured a polygraph exam knows well. In the words of Shlomo Shpiro, "Israeli intelligence officers are taught from the onset that they are expected to lie to the whole world, only not to their superiors and colleagues" (in footnote 4). What applies to Israel certainly applies to many other countries' intelligence agencies today.

All intelligence agencies lie to foreign targets, and almost all lie to their domestic press as well, but most don't admit that. This is at least as much for public relations as for actual security purposes, but it is almost impossible to separate the two when propaganda is such a pervasive aspect of intelligence affairs. Needless to say, this dichotomy of telling truth to some while lying to others can be very difficult to maintain for mere human beings, which is one reason why really good spies are so scarce.

Attorneys suffer similar dilemmas, compounded by their art with words. In theory attorneys are never supposed to actually "lie" but they are supposed to "rationalize the facts to support their client's case." Parsing that difference can be an art bordering on perjury. In fact attorneys can lie with every bit as much skill as intelligence professionals testifying to Congress how the US government never "tortured" people, aided and abetted by attorneys who changed their definitions of torture for that purpose. In fact each of these professions encounters situations where unvarnished truth telling can have very negative consequences, for themselves, for their clients or even for the country, even though all are in some abstract way committed to truth and the common good.

In each of these professions consequences matter a great deal, much to the consternation of deontological philosophers. The deontologists may be characterized as "rule oriented" ethics philosophers as opposed to "utilitarians". Utilitarians think that consequences matter a lot in ethical calculations. Ordinary people are split about evenly between these two modes of thinking about ethics, so many of each kind find their way into each of these professions. This leads to "black and white" ethics camps and "expedient" or "relative" or otherwise "situational" camps in all places. A similar complication is captured by the concepts of "letter" of law versus "spirit" of law.

Each of these professions also holds a special place for "confidentiality" in its codes of honor, but they are not identical. In medicine, patient confidentiality is a very high moral goal with strict ethical guidelines. Confidentiality goes out the window, however, when the law requires reporting for public health (e.g. epidemic disease) or criminal reasons (e.g. child abuse). In law, the parallel would be client confidentiality, and in both cases there are special laws that protect doctors and lawyers from aggressive discovery under most legal circumstances. These laws are accompanied by technical terms like "attorney client privilege." The right to keep secrets is even more pronounced among the military, and can become an almost cultish, core aspect of culture among spies. In both those cases the ultimate reason is that they don't want to be killed by their enemies who operate under similar conditions of secrecy and lethality.

They all have their reasons, good, defensible reasons as well as bad ones. Careerism is probably the most common "bad reason" among intelligence professionals. An easier example of a bad reason for confidentiality would be the code of "omerta" which serves organized crime. People who break laws for a living have plenty of practical reasons for confidentiality, but most philosophers would not rate omerta as high morally as military secrecy for the survival of the nation. The difference is consequences. Bureaucracies in general and politicians in particular often cover up things that are merely embarrassing rather than issues of national security. Again, the core paradox is that knowledge means power, power which can do good or evil depending on the user. And secrecy can serve good or evil objectives equally, although evil often ***requires*** secrecy while good goals generally do not. Remember the organized criminals, and compare them with legitimate business for real-world examples of that dynamic. Evil ***requires*** secrecy, but good goals generally benefit from open review. This is a powerful diagnostic of actual agendas, but it is difficult to apply where secrecy is the primary rule.

A really short history of medical ethics, now morphed into "bioethics."

Medical ethics has a very long history and yet is still changing in details. In fact it underwent a substantial metamorphosis in the 1960's due to rapid technological changes such that a new, broader term is more common now, "Bioethics." That term covers the range of issues raised by recombinant DNA and other bioengineering technologies that can create good genetically modified foods and drugs or bad biological weapons with equal ease. Therefore this review must be cursory. [9]

Probably beginning long before Hippocrates, but written down and promoted by him, the core issue for medicine has always been how to help patients instead of harming them by unwise, ineffective or inappropriate "treatments." Quacks abound, sick people have always wanted help, and some have always been willing to pay dearly for that help. So "doctors" have wanted to treat them for good, for commercial, or rarely for really bad reasons (injunctions against poisoning your patient were part of the Hippocratic Oath and poisoning was remarkably common in medieval times, with and without medical help).

Other highlights on the European trajectory to modern bioethics were the creation of medical schools and colleges by medieval Kings (like Frederick II, King of Sicily and Holy Roman Emperor in 1224 CE, and King Henry the XIIIth in 1511 England), publication of a book called "Medical Ethics" by Thomas Percival in 1803, [10] the creation

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[9] For those who want a better version, an excellent book on this topic is A Short History of Medical Ethics by Albert R. Jonsen, Oxford University Press (OUP), 2000, and he has also written specifically about the emergence of bioethics in The Birth of Bioethics, OUP, 1998.

[10] Percival, Thomas. Medical Ethics: or a Code of Institutes and Precepts Adapted to the Professional Conduct of Physicians and Surgeons. London: S. Russell, 1803. A modern edition was published in 1927 by Williams and Wilkins, Baltimore, MD, edited by Chauncey Leake.

of the first American Medical Association code (in 1887) and a series of AMA codes of ethics that became shorter with each revision. The first was called the Percivalian Code, but it was revised in 1903, 1912, and by 1957 it had been reduced to 10 "terse statements." Then the roster of AMA rules started growing again in 1980.

Those codes were challenged by the horrors of Nazi experimentation on vulnerable people that gave rise to the "Nuremberg Codes" on universal medical ethics. Then the wave of technology developments during the 1950's and especially the 1960's resulted in many new concerns and ultimately resulted in "institutional review boards" (IRBs) at every hospital and university in America that does research on human subjects. A simple timeline of those headlines (derived mostly from Jonsen's "Short History") illustrates the profound role of technology in creating new ethical conundrums, and stimulating relevant professionals to wonder what rules should guide their lives.

Headlines in Modern Medical Research and Practice that Stimulated New Ethics Codes:

Aug. 19, 1947: 20 Nazi physicians were judged guilty and seven sentenced to death for doing grotesque experiments on prisoners. The idea of an ethic not just for doctors but for all research on human subjects was advanced. They did not hang the nurses and orderlies, but a subsidiary issue is always what to do with the many other people in large systems when those systems go bad. Intelligence professionals attend! Stanley Milgram's classic experiments in social psychology proved beyond reasonable doubt that lots of "Good Germans" exist in every society who will do what they are told to by authority. What nation does not teach that obedience to your elders, teachers and government is a virtue? So what to do when national commands go bad is something responsible warriors ponder.

April 25, 1953: "Nature" publishes the Watson and Crick article on DNA. This leads to a revolution in biotechnology which can now convict rapists or save lives in myriad ways. Who gets to know how much about a person's DNA is now an active field for attorneys and the US Congress (see the Genetic Information Nondiscrimination Act of 2008) [11].

Dec. 23, 1954: First kidney transplant; from that point on who gets these rare 'spare' organs becomes a very serious ethical issue. Not all do, or can, so some die young.

March 9, 1960: The Seattle Dialysis Selection Committee was formed, because cost precluded unlimited access to this technical substitute. So again someone had to decide who got access that could save their lives, and who did not so would die young.

May, 11 1960: Oral contraceptives are approved by the FDA. For many women, this was revolutionary and liberating. For some churches it was a disaster, and the two groups have been fighting ever since over ethical implications.

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[11] Harmon, Amy. "Congress passes bill to bar bias based on genes," in The New York Times, May 2, 2008.

Dec. 3, 1967: The first heart transplant was performed, raising the specter of many more ethical dilemmas as each vital organ would apparently become transplantable (except, most likely the brain) leading inevitably to a shortage of all organs.

July 26, 1972: The Tuskegee Revelations – the American public was shocked to learn that doctors had conducted secret experiments on almost 400 black men with syphilis, some of whom were treated minimally for 40 years, and most others not at all. All were misled because the main real goal was morbidity data in life and autopsy data after death. Combined with the shocks of Nuremberg, this locked in IRBs and promoted bureaucratic overreach that can become quite ridiculous, which I have labeled the kudzu problem.

January 22, 1973: The U.S. Supreme Court rules on abortion in "Roe vs. Wade." Domestic politics has not been the same since. But many, many attorneys have been employed adjudicating the same issue thousands and thousands of times.

1974 – 1978: The National Commission for the Protection of Human Subjects of Biomedical and Biobehavioral Research was empowered to look at and recommend action on those research issues. During this same time period, the Church Committee of the US Senate uncovered massive and disturbing research by the CIA on mind control methods known as the MK-ULTRA project (which had about 200 subprojects, scattered among many of our best university hospitals as well as more remote locations). All these revelations led to substantial rethinking of the previous near absolute freedom of universities and hospitals to conduct research on human subjects considered willing.

April 14, 1975: The Karen Ann Quinlan case hits the U.S. courts, leading to legal adoption of a Harvard Medical school opinion on when a person becomes "brain dead." The ethical issue was what to do when technology enabled indefinite support of mere bodies at horrific expense to someone.

July 25, 1978: Louse Brown, the first "test tube" baby, is born in England. This leads to a revolution in "in-vitro fertilization" and other artificial conception techniques. Every aspect of these complex processes raises ethical concerns to someone, and "who decides" becomes a perennial other issue.

April 18, 1979, the Department of Health and Human Services of the US government publishes a "Belmont Report" that identifies three core principles that must always be followed, summarized as "respect for persons," "beneficence" and "justice." The devil, of course, is always in the details.

April 11, 1983: The AIDS epidemic is identified, and public fears about pandemics rise again for the first time in decades. Public health objectives often challenge the primary medical focus on welfare for the patient. For the foreseeable future cost will also be a major factor on the margins of what pubic health can do or require to be done.

April 25, 2003: Completion of the Human Genome Project's first mapping of a human DNA sequence. Biological weapons labs and drug companies worldwide take notes.

April 25, 2008: The U.S. Senate passes the Genetic Information Nondiscrimination Act by a vote of 95 – 0. April 25 becomes "DNA Day" as the power (for good **and** for evil) of Watson and Crick's discovery 55 years earlier becomes ever more clear. This Act protects Americans from discrimination based on genetic information when it comes to health insurance and employment.

The progression of medical headlines above highlights the role of technology in driving evolution of medical ethics and laws. But some other themes should be explicitly identified. First, scandal was an important and periodic accelerant of ethical thinking, as exemplified by the Nuremberg and Tuskegee cases. Second, churches were often involved in both positive and negative ways. Churches sponsored some of the best and earliest medical enterprises, and they asked very appropriate moral questions on many occasions. But they also obstructed progress and sometimes even violated core moral principles when technology overran medieval thinking or ancient ethical norms.

Of course religious institutions have their own ethical issues and flaws, and are far from uniform in their conclusions about ethics in general and medical ethics in particular. But it has been good for the professions that churches have raised ethical questions on a regular basis. Because the other pervasive and ever present theme to this whole enterprise is money, power, and who is getting how much of those. It is time to return to lawyers.

A really short history of law and legal ethics

While codes of law existed as long ago as 3000 BC in Egypt and Babylonia, those codes did not appear to affect modern codes very much. The Old Testament Leviticus records 617 rules of conduct required by Yahweh for the 'good society' before it was alleged that Moses got just Ten Commandments from a similar but more concise deity. These roots are alleged to be the beginning of both law and ethics as codified in written words for the modern era. Regardless of origins, some of these most basic rules remain core principals of legal ethics today, foremost "Do not steal." The Greeks came and invented everything from democracy to police-state rule (Athens vs. Sparta). Confucius wrote the "Analects," Lao Tzu his "Tao der Ching" and someone in South Asia wrote the "Bhagavad Gita." Native Americans formulated ethics based on considering the "Seventh Generation" and concepts like "Mitakuye Oyas'in" (We are all relatives) but since they did not write these concepts down, they were mostly ignored by the Europeans who came later. Jesus of Nazareth proclaimed a single 'golden rule' which is also found in most of the ancient codes, and left a larger legacy. Mohammed produced a very large book of rules applied with variable vigor in many scattered places and cultures. Later, Genghis Khan wrote his 36 Laws of the Yasa, and this simple code set the tone for an empire. One law was not to slaughter animals like the "Mohammedians." Stealing was also forbidden by the great Khan, but enforcement against those who broke his rules was more rigorous than some. In fact, enforcement of most of his rules was by death to the malefactor. Two things we know for sure from this, a) compliance is more brisk if enforced by death, and b) police states are lousy, poor, ignorant places to live.

After Genghis Khan came Czars and Emperors, Shoguns, Kings, Imams, dictators and many forms of potentates. Some say that religion has nothing to do with legal codes, but they are just avoiding controversy because religion has everything to do with legal codes, including codes for lawyers, and fundamental arguments over what is truly "just." Try arguing "Sharia" with an Islamic jurist without reference to religion.

Since this is a very short paper written mainly for members of the American intelligence community, I will fast forward to the development of American codes for attorneys and just encourage serious students to inquire how similar trends evolved in the rest of the world. There is no doubt that similar thought has occurred in China and India, both ancient and modern. Scandal was again a very robust stimulant. But adjudicating the distribution of money and power seemed to play a larger role for attorneys than for doctors. One sign was the long-standing prohibition on advertising. That prevailed until June 16, 1975 when the Supreme Court decided this infringed on "trade".

Headlines in American Law and Practice that Stimulated New Ethics Codes: [12]

1836 -- David Hoffman, an attorney who founded the Law School at the University of Maryland published for his students 50 "Resolutions in Regard to Professional Deportment." These included the original requirement for *pro-bono* (free for poor) work .

1854 -- Professor and Judge George Sharswood published a similar list for his students, called "A Compend of Lectures on the Aims and Duties of the Profession of Law."

1887 -- The Alabama Bar Association published the first formal "Code of (Legal) Ethics" in America, and started a ball rolling that would eventually become a cardinal feature of the young American Bar Association (ABA).

August 27, 1908 -- The ABA approved 32 "Canons of Professional Ethics." Enforcement was limited to expulsion from this elite, exclusive club of influential attorneys. That would change drastically over the next century. This first formal code included the original ban on advertising as well.

August 12, 1969 -- After many smaller revisions, generally reducing the number of canons, a complete revision was approved now called the ABA "Model Code of Professional Responsibility."

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[12] Drawn largely from Legal Ethics in a Nutshell by Ronald Rotunda and Michael Krauss. St. Paul, MN: Thomson West Publishing, 2003, and Henry S. Drinker's "Ethical Standards and Professional Conduct" in the Annals of the American Academy of Political & Social Science, Vol. 297, p 37-45, Jan. 1955. [Author's note: that "nutshell" book totals 484 pages where 59 rules are explicated with reference to 105 cases cited. This shows what happens when attorneys go to work on ethics codes, which must be simple to be truly internalized. Simple, direct, and thought through in depth is better. The issues of how to "teach" "ethics" "effectively" are beyond the scope of this paper.]

1973 - 75 – The Watergate debacle. This was especially important to the evolution of legal ethics in America because people noticed that no less than 12 of the indicted and many more unindicted co-conspirators were lawyers. That observation combined with preceding legal zeal in regulating every other profession transformed previously non-binding ethical guidelines into elaborate regulatory structures with serious teeth.

August 1983 – The ABA adopts many other recommendations of a "Kutak Commission" which met from 1977 – 1983 to revise the "Model Code" in response to criticisms. It was now called the "Model Rules of Professional Responsibility."

1986 -- The American Law Institute drafts a "Restatement of the Law Governing Lawyers." This was not meant as a rigid, enforceable code, but rather as a set of principles to be pondered. Deep thinkers prefer principles rather than rules, but both have appropriate places and roles.

August 2002 -- The ABA finishes another 5 year revision process called the Ethics 2000 project. The result is still called the "Model Rules of Professional Responsibility" and are the basis for a comprehensive test that almost all attorneys-to-be in America today must pass to check on their knowledge of the "black letter ethical rules" of conduct (as opposed to more flexible goals to aspire to). This test is called the MPRE or Multi-State Professional Responsibility Exam. Minnesota, for example, now disbars about 30 attorneys per year for violations of this increasingly detailed code of enforceable rules.

Charles Wolfram wrote the most cited essay I have found on Legal Ethics for the Georgetown Journal of Legal Ethics in the winter of 2002. He observes a recurring desire for formal "ethics" accompanied by fear of regulation. Michael Ariens claims that every major advance save one of the formal legal ethical codes was actually prompted by scandal. [13]

Whatever the balance of motives it is clear by the turn of the 20th century that formal legal education had triumphed over the apprenticeship system, and with this came a desire for codes approved by bodies of practitioners rather than by individual teachers.

What America thought about legal ethics during this time had a disproportionate effect on the evolution of global legal thought. American has by far the most attorneys of any nation in the world (about 1,143,358 active, according to the ABA in 2007). That fact combined with our dominance of industrial and political power after World War II, extending even to writing the constitutions of our vanquished enemies, had a great global impact. So what was written here, then, had disproportionate influence elsewhere.

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[13] Wolfram, Charles. "Toward a history of the legalization of American legal ethics II, the modern era." In The Georgetown Journal of Legal Ethics, Winter 2002. Michael Ariens article, "American legal Ethics in an Age of Anxiety" can be found at http://works.bepress.com/michael_ariens/1 .

This came to a crashing, transformative nexus when the largest attorney in America, President Richard Nixon aided by a crack team of dozens of other attorneys broke the most basic rules of fair play in democracy. They had help from friends from the CIA like (attorney) Howard Hunt and G. Gordon Liddy. The public noticed the large role of attorneys in this great scandal which crystallized the massive net of enforceable and very detailed regulations that rule attorneys' professional lives these days.

The American Intelligence Community

Stephen Marrin and Jonathan Clemente argue that the intelligence community needs to "professionalize" and that this goal would be well served by developing a professional ethos with related codes of ethics. [14] They offer medicine as a model to be considered. When pressed on similarities and differences between these professions Marrin acknowledges most, but stresses that the medical model also has to deal with a very diverse multiplicity of specializations. Furthermore, he says that any genuine ethic must be grown organically, from thousands of discussions among practitioners, rather than being formulated and passed down from any authority. Thus it can assume many forms. If an ethos does not develop in this organic way, he argues, then it has no chance of catching on and sticking around for any significant length of time.

Marrin and Clemente focused on analysts, the largest category of intelligence professionals. But insiders know that operators often run the show in America and elsewhere. Brian Snow, recently retired from the SIS at NSA has been working for five years on a "Mission Ethics" oriented toward collectors and operators more than analysts. While speaking to many relevant groups and IC managers, Mr. Snow has also moderated discussion among "about 50" serious individuals, roughly one-third active intelligence duty, one-third active ethicists of various kinds and one-third "other." Snow completely agrees with many others that effective professionalization requires an organic process and that the intelligence community includes profoundly differing sub-groups. But since his draft code has been much worked on by many able minds already, I offer its example below. You can be certain that Mr. Snow is open to suggestions for improvement.

DRAFT Intelligence Community "Mission Ethics"

Preamble:

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[14] Marrin, Stephen and Jonathan Clemente. "Modeling an Intelligence Analysis Profession on Medicine." In the International Journal of Intelligence and Counterintelligence 19, No. 4 (Winter 2006-2007): 642-665. Marrin, Stephen. "Creating a Code of Ethics for Intelligence Analysis" a paper delivered at the annual conference of the International Studies Association in Chicago, IL, USA on March 2, 2007. Another new society similar to the Intelligence Ethics Asso., but devoted to professionalization of intelligence education has also emerged recently, called the International Association for Intelligence Education (IAFIE). It can be found at: http://www.iafie.org/

Intelligence work may present exceptional or unusual ethical dilemmas beyond those of ordinary life. This code should be read as strong guidelines not rigid rules admitting no exceptions. Ethical thinking and review should be a part of our day to day efforts; it can improve the chances of mission success, preserve our alliances, protect our nation's and our agencies' integrity, and protect us from the consequences of bad choices. Therefore, we adhere to the following standards of professional ethics and behavior:

1. First, do no harm to U.S. citizens or their rights under the Constitution.

2. We uphold the Constitution and the Rule of Law; we are constrained by both the spirit and the letter of the laws of the United States.

3. Expediency must never be an excuse for misconduct.

4. We are accountable for our decisions and actions and support accountability processes to ensure our adherence to these principles.

5. Statements we make to our clients, colleagues, overseers and the U.S. public will be true, and structured not to mislead or unnecessarily conceal in any way.

6. We will seek to resolve difficult ethical choices in favor of constitutional requirements, the truth, and our fellow citizens.

7. We will address the potential consequences of our actions in advance, especially the consequences of failure, discovery, and unintended consequences of success.

8. We will not make decisions that impose unnecessary risk on innocent parties.

9. If an action might result in harm to our citizens, seek authorization from a national authority external to your agency that is in your chain of command.

10. Although we may work in secrecy, we will work so that when our efforts become known, our fellow citizens will not be ashamed of us and of our efforts.

11. We will comply with all public and international human rights agreements that our nation has ratified.

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Conclusions

a. **Watch out for the kudzu problem.**

b. **Protect whistleblowers; they are canaries in your coal mine.**

c. **Don't confuse ethics with law.**

d. But then, **Take ethics for spies seriously**, because good intelligence ethics can be a national asset, a force multiplier of significant magnitude. The converse on the other hand, being known as mere thugs and thieves, or imperialists, does not enhance either alliances or intelligence sharing. We need both to face the great challenges of our time.

e. And consider these **last words about torture**. Of course it **sometimes** works, tactically, badly, but the strategic costs are so high our country solemnly swore **never** to do that. **Breaking treaties weakens the nation in many ways**; we should not do that any more. And **lying to the American public about this** weakens us in too many ways to list.

The kudzu of regulation grows so fast it can choke any ecosystem it invades. Be warned that this "professionalization" business can get out of hand and in a few decades you may have to take many tests based on thick books of rules that every "certifiable" (a.k.a. employable) "professional" must know, and abide by, or else. This will occur quicker if attorneys get involved. Close behind them will come the traditional security enforcers looking for more easy paid work for them to do. Enforcing rules is much easier than running agents, conducting real operations or analyzing real secrets and serious issues. Regulations spread spontaneously; bureaucracy grows unless it is contained by something active. The best intentions zealously applied can result in a forest of regulations that I called the kudzu problem earlier. This can be paralytic in a serious crisis. So avoid it like disease.

There are whistleblower protection laws for many U.S. Federal employees, but they specifically do not apply to intelligence personnel. All bureaucracies find ways to be cruel to whistleblowers anyway, but it is easier for intelligence agencies. If you are an intelligence professional one of the most cruel is a career ending removal of your security clearance. From a pure national security point of view this is uber-stupid because true whistleblowers tell you what you really need to know instead of whatever party line is currently dominant. Whistleblowers should be protected, not ostracized, burned at stakes or eaten by security hyenas.

Elsewhere I insult attorneys too often. You should be aware of the positive need for attorneys in this process (without whom criminals rule bureaucracies and nations) and at the same time of the great dangers that attorneys pose. I insult them rashly, for without law we are doomed. The powerful need restraints. Law provides some. But ethics is not law, and every time the lawyers try to make it law, ethics loses its vitality and utility. Properly done, ethics becomes the best part of a professional identity that sets people apart from ordinary trades. Properly done, as in spiritual development, ethics becomes a part of the core identity of a self-sufficient person proud of the rare work that they do.

But having paid due caution to those real risks, then intelligence professionals should take ethics seriously because it will be better for us as human beings in a tough line of work. It will also be better for the profession, and it will be better for the nation and for mission success. Espionage is a dirty business and ethics is an antidote to moral

corrosion. Taking ethics seriously is MUCH better for the families of spies, for those they associate with, and for the principles that make some countries great. There is a reason we swear oaths to a Constitution in America. It is the same reason why a true professional ethos must emerge for spies in the third millennium of the common era.

We have signed international treaties that prohibit torture under all circumstances, and America has enacted domestic legislation to enforce that ban. Torture is immoral and illegal, **and it is impractical most of the time**. But some attorneys and politicians have shown themselves to be indifferent to actual laws, to the U.S. Constitution, and thus rationalize torture. For them torture should be subjected to the same kind of cost/benefit analysis everything else is. Doing so is devastating to the arguments of those who like torture. Gen. Michael Hayden, then Director of the CIA testified to Congress that his agency had waterboarded only "three very high value" detainees on issues of greatest importance. He claims that useful information was obtained that "saved American lives." Perhaps. A few. But at what cost? Here are a few costs to consider:

1 – Lots of countries won't work with us anymore because of the torture issue, which dominates many other discussions of greater importance in the big picture.

2 – Many intelligence professionals won't share data with us anymore or even detainees because they don't want prisoners to be tortured or killed by us.

3 – We once were the world's leader and emblem for human rights. In fact, Eleanor Roosevelt put that term into international law. Now we are a pariah among nations. And all for the fruits of a few 'high value detainees?' In a war against third world terrorists without substantial resources? For that we despoil a reputation worth trillions that took decades to create? We expose our troops, diplomats, Peace Corps, civilians, etc. to reciprocal barbarism, for THAT?

4 – We have a difficult time getting good people to work for us anymore. No insults intended to those who do, but really, the quality of people who simply say no to work with US intelligence is tragic when the nation needs its best and brightest to step up and take risks at modest income for the national welfare. And almost 50% of those who sign up with certain agencies leave within two years. How many indicators do you need to know that something is gravely wrong?

There are thousands of brilliant, creative, multilingual and patriotic people who simply will not consider working for a gang of thugs that beats innocent people to death, and then rationalizes such acts as tragic but necessary costs of war. [15] The alleged benefits of the torture admitted simply were not worth such costs. And worse, official,

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[15] An exceptionally vivid case is documented by the winner of the 2007 U.S. Academy Award for Best Documentary, "Taxi to the Dark Side" produced by Alex Gibney. But that describes just one case of approximately 30 detainee deaths while being interrogated documented by other reports like the Taguba review of Abu Ghraib and the Report to the Secretary of Defense on "Detention Operations and Detainee interrogation Techniques (U)" released on March 7, 2005 but submitted on May 25, 2004. The latter report was written by Vice Admiral A. T. Church, US Navy.

sanctioned torture is a stain upon the nation that will damage us for decades. Lest you doubt the reality of officially sanctioned murder of innocents during the poorly named "war on terror" read the details in Vice Admiral Church's Report to the Secretary of Defense on "Detention Operations and Detainee Interrogation Techniques." Of course they did not intend for the victims to die; some just did. Some always do die where torture is used, and some innocents are always caught up in the nets that gather bad people,[16] which is why the Geneva Conventions and other solemn treaties we have signed made torture the one act forbidden by international law under exactly all circumstances, and irrespective of any rationalizations by any government.

Some comparisons were made to the medical profession earlier, and its quest for ethical foundations. The chief medical ethicist at the University of Minnesota Medical School, Dr. Steven Miles, wrote a book called "Oath Betrayed" that focuses on damages that come to his medical profession when doctors, nurses, psychologists and psychiatrists collaborate with sanctioned torture in Biscuit teams (Behavioral Science Consultation Teams) and other ways. His bottom line is that this is bad for doctors and psychiatrists, who will never regain good professional reputations outside of secret power systems once they violate the Hippocratic oaths they swore to as part of their professional development. I go further and observe that it's not good for their mental health or their families either.[17]

Other professionals leave before the worst occurs, and some speak out from their positions as now-retired military officers, intelligence officers, state department officers or all three as Col. Ann Wright was when she resigned in protest and compiled stories from other whistleblowers of the modern era. [18] There are unintended but very serious consequences and costs which arise when a nation goes barbaric. Col. Wright helped to open the new embassy in Kabul and she dearly hopes for a positive outcome there. But she also knows that if we torture too many innocent taxi drivers to death in our mad rush to get "actionable intelligence," then positive outcomes for us will be impossible.

Enough about torture; like kudzu, it tends to crowd out a thousand other relevant things. Ethics for spies is certainly a novel thought, a true oxymoron of sorts. But it is also a force multiplier of very great magnitude, or a force degrader if one loses sight of why we fight. Those who want a true profession to emerge from the chaos of clandestine intelligence today should attend to ethics much more carefully now than in the past. It is better for them and better for us. Otherwise, we will lose the Long War of civilization versus barbarism. And that would be a very bad thing.

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[16] Like Germany's Khaled Masri and Canada's Maher Arar. Neither allied nation was amused.

[17] As a matter of practical fact this kind of behavior induces mental illness among a significant number of practitioners and increases rates of alcoholism, divorce and suicide as detailed in a paper I wrote for a classified entity.

[18] Wright, Ann and Susan Dixon. Dissent: Voices of Conscience. HI: Koa Books, January, 2008.